On the Margin: Observations on Reception, Ratio and Reform of the Strasbourg Court

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Strasburg prompts Discussion. Last friday, the European Court of Human Rights stated in Stübing v. Germany (Application no. 43547/08) that the sanctioning of sexual intercourse between consanguine siblings in German criminal law does not violate the Convention. Possible changes are now in the hands of the domestic legislator – while the applicant of course can still request that the case may be referred to the Grand Chamber for a rehearing. Due to the tragic circumstances of the concrete case, comments on the decision are often passionate. Emotion creates attention. The ECtHR has finally made its way into the broader German public sphere. This time around, no journalist would have illustrated her reporting on a Strasbourg decision with pictures from her archive showing the red gowns of the Luxemburg Court. However, anyone interested in the background and internal structures of the judges' arguments should not hesitate to look into the decision.

A careful reading of the Court's reasoning unveils what "Stübing" might hold in store for the future of human rights and fundamental freedoms in Europe. And whether one takes a critical stance on the judgement, as Helmut Kerscher in the "Süddeutsche Zeitung", or expresses mild agreement, as Reinhard Müller in the "Frankfurter Allgemeine Zeitung", one thing seems clear: the decision offers peace to the critics of the Strasbourg Court. "A different decision would have re-ignited the smouldering controversy on status and competences of the overburdened European Court on Human Rights", writes Müller. And Kerscher admits: "It is even understandable that an extremely overburdened international court, struggling for recognition, exercises such restraint."

Judicial Appeasement?

Is the Court now indeed taking an "appeasement approach" that responds to harsh criticism from certain signatory states (most outspokenly from the UK), as Max Steinbeis has speculated here on the Verfassungsblog, and Helen Fenwick over on the UKCLG Blog (in a highly informative and detailed contribution)?

In "Stübing", the Court seems determined to re-visit the scope and limits of the ECHR. In paras. 59 und 60, we find a text book-like application of the margin of appreciation doctrine:

> *59. The Court reiterates that a number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State when determining any case under Article 8 of the Convention. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted (see, for example, Dudgeon, cited above, § 52; Christine Goodwin v. the United Kingdom [GC], no. 28957/95, § 90, ECHR 2002-VI; and Evans v. the United Kingdom [GC], no. 6339/05, § 77, ECHR 2007-IV). (…)*
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> *60. Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider. By reason of their direct and continuous contact with the vital forces of their countries, the State authorities are, in principle, in a better position than the international court to give an opinion, not only on the "exact content of the requirements of morals" in their country, but also on the necessity of a restriction intended to meet them (see, among other authorities, A, B and C, cited above, § 232, and Handyside v. the United Kingdom, 7 December 1976, § 48, Series A no. 24).*

In "Stübing", the Court looks into aspects of subsidiarity and the margin of appreciation doctrine that are central features of the current reform process of the ECtHR. The reform process began 2010 with the High Level Conference on the Future of the European Court held in Interlaken. The Interlaken und Izmir Declarations encouraged the ECtHR "to take fully into account its subsidiary role in the interpretation and application of the Convention". The responsibility to protect human rights is shared between the State parties and the Court. It requires the signatory states to conform to their obligation under the Convention. The German Federal Constitutional Court (Bundesverfassungsgericht) has recently stressed that obligation in its judgement of 4 May 2011 (Preventive Detention I), see press release in English here, (para. 90):

> *„Die Heranziehung der Europäischen Menschenrechtskonvention und der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte als Auslegungshilfe auf der Ebene des Verfassungsrechts über den Einzelfall hinaus dient dazu, den Garantien der Menschenrechtskonvention in der Bundesrepublik Deutschland möglichst umfassend Geltung zu verschaffen, und kann darüber hinaus Verurteilungen der Bundesrepublik Deutschland vermeiden helfen."*

Brighton: Making Principles Explicit …

From 18 -20 April, a high level conference on the future of the European Court of Human Rights will be meeting in Brighton to discuss the future of the overburdened ECtHR. In any case, the result will be a "Brighton Declaration". A leaked draft of the UK's proposals for the reform of the Strasbourg court discloses how the British government (currently chairing the Council of Europe's Committee of Ministers) envisions the future of the EHCR system. The leaked document prompted a lively debate (meanwhile, there are also updated drafts discussed on the web, but I have not been able to track online versions of those). The draft calls for the enhancement of the principle of subsidiarity and the margin of appreciation doctrine "by their express inclusion in the Convention":

> *19(a): "The conference therefore welcomes the development of the Court within its case-law of principles such as subsidiarity and the margin of appreciation doctrine…and encourages the Court to give great prominence to these principles in its judgements; (b) Concludes that the transparency and accessibility of the principles of the margin of appreciation and subsidiarity should be enhanced by their express inclusion in the Convention, and invites the Committee of Ministers to adopt the*

> *necessary amending instrument within one year".*

A group of leading human rights NGOs criticizes these plans vehemently. An incorporation of the principle of subsidiarity and the margin of appreciation doctrine would trespass to an unacceptable degree on the role and autonomy of the Court in interpreting the Convention, and thereby run counter the evolutive character of the Strasbourg jurisprudence. To single out the margin of appreciation, along with the principle of subsidiarity, in the Convention text, without reference to other, equally significant, principles of interpretation applied by the Court, would misrepresent the role and status of those principles, suggesting that the Court should give them priority in its application of the Convention rights. Furthermore, the margin of appreciation doctrine would be rather unfit for incorporation, anyway:

> *The principle of margin of appreciation is particularly difficult to define. Attempts thus far have not accurately managed to embody the complexity of the Court's jurisprudence. There is much subtle variation in how and when the margin applies. If the Convention were to include any definition of the nature or breadth of the margin of appreciation, or if it were to impose a wide margin of appreciation, this would significantly undermine the Court's capacity to apply the principle with sufficient care, restraint and flexibility to protect Convention rights.*

… or Taking Interpretation Seriously?

In "Stübing", the Strasbourg Court has diligently examined the German legislator's and the Federal Constitutional Court's margin of appreciation. The references in the ECtHR's decision are examples of a diligent and and flexible approach to supranational human rights jurisprudence. Indeed, it seems that the judges in the Palais des Droits de l'Homme are keen to point to their own "subsidiary role". In "Stübing", the ECtHR refers to a principle of interpretation (the margin of appreciation doctrine) that took shape – as Ed Bates has shown in his illuminating book on the history of the ECHR – long before "Handyside", and has its origins already in the early case law of the European Commission on Human Rights.

Now, why not make a tried and tested principle excplicitly part and parcel of the Convention? Why oppose incorporation? To the European lawyer, the question appears familiar: it reminds of the debate on the incorporation of a declaration on the primacy of EU law into the Lisbon Treaty.

Firstly: The NGOs' arguments are well-grounded. The evolutionary character of the Strasbourg system of regional human rights protection, essential feature of the ECHR as a "living instrument" ever since the ECtHR's 1978 "Tyrer" judgement, runs counter any conventional petrification of the ECtHR's interpretive and methodological logics.

And, secondly: Within the European constitutional sphere, a living reality of pluralism has emerged that transcends all rigid hierarchies. Admittedly, this may not already be the "Cosmopolitan Legal Order" which Alec Stone Sweet observed in his Berlin Seminar Recht im Kontext Lecture last october (Stone Sweet's paper is now available here, in its original English version and in a German translation provided by Hannah Birkenkötter). However, it can not be doubted that the European "Rechtsprechungsverbund" (I am hesitant to translate the term as "European Constitutional Federation", as I find it more suitably characterised – in Franz Mayer's words – as a "constitution composee de l'Europe") is a heterarchical system. The European "Rechtsprechungsverbund" is, as Stefan Oeter stated in his 2006 lecture at the annual meeting of the German Association of Public Law Scholars (Deutsche Staatsrechtslehrervereinigung), "more similar to a network structure than a to a hierarchical structure, an organisation geared towards interactive self-coordination" (eine "eher netzwerkähnliche denn hierarchische, auf wechselseitige Selbstkoordination ausgerichtete Organisation").

That interactive self-coordination should be left to the courts, without any conventional control, based on rules laid down in the Convention.

In recent years, we have witnessed a gradual rapprochement of judges and justices, of European and domestic courts. Their approximation is sometimes harmonious, sometimes competitive or concurring. They do not always agree. But they are involved in a permanent dialogue.

At the Crossroads

And yet: Has not the time come to clip the wings of the ever more dynamic Strasbourg rights' revolution? Now, in Brighton? As we reflect upon the future of the ECHR, we might give a closer look to a brandnew paper by George Letsas, University College London: "The ECHR as a Living Instrument: Its Meaning and its Legitimacy" . (Letsas has also written one of the truly most enlightening pieces to be picked from the ever-growing piles of literature on the "margin of appreciation").

Letsas convincingly argues that the conceptualisation of the ECHR as a "living instrument" has been a central feature of the Strasbourg jurisprudence from its very beginnings. The Convention should be interpreted and re-actualised in a present-day context – here lies for Letsas the core of the Court's legitimacy: "commitment to evolutive interpretation is essential, rather than a threat, to the Court's legitimacy".

For Letsas, a gradual enhancement and an increasing density of the European constitutional sphere through the enforcement of universal and shared human rights is inherent in the ECHR's DNA – although the Convention's founding fathers would not have imagined, in 1950, what this might entail in 2012:

> *There is no doubt that most of old contracting states would not have anticipated the expansive interpretation of the Convention rights by the Court and the burden that the Strasbourg jurisprudence would come impose on state sovereignty. On the other hand however, there is equally no doubt that the ECHR contracting states wanted to create not only legally binding obligations but also legally binding determinations of when these obligations have been breached. Unlike the ICCPR Human Rights Committee or other international 'soft-law' mechanism, the reform of Protocol 11 ECHR clearly established Strasbourg as a court whose judgments are legally binding. They did so moreover with a view to promote specific aims listed stated in the ECHR Preamble: first to 'achieve greater unity' between them and second, 'to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration'. Greater political unity and collective enforcement of fundamental rights were the abstract background aims of the initial drafting of the ECHR and they continue to be so, until states reform the ECHR or withdraw from it.*

Shall we witness, in Brighton, an ECHR reform meeting doing away with the Court's evolutionary logic and interpretive ethic? Should we worry about Strasbourg? George Letsas makes clear what is at risk:

> *It is too early to tell whether the Court's interpretive ethic, crystallised after the reform of Protocol 11, will survive the recent attacks on the Court's legitimacy. The current political climate and the continuing economic crisis put additional pressure on supranational institutions, including Strasbourg, to show greater deference to national authorities. The Court treated the ECHR as a living instrument, nourishing it to become a large and fairly consistent body of rights-based principles for the whole of Europe. Strasbourg's interpretive ethic is a unique asset for Europe and the best example of a successful international system for protecting human rights. If the Court continues to treat the Convention as a living instrument it will not lose its legitimacy; it will lose its legitimacy if it doesn't.*

The responsibility to understand and apply the ECHR as a “living instrument” is a task incumbent not only on the ECtHR. The Convention’s legitimacy is at stake, and the legitimacy of the European judges. European courts on all levels are increasingly willing to take on that challenge and to engage in a transnational dialogue of judges. They perceive themselves as actors in a common constitutional area. They develop a high level of mutual awareness and engage in cross-border communication. Sometimes, their shared responsibility requires restraint, as the ECtHR seems to demonstrate in "Stübing". They bring a variety of perspectives, priorities and constitutional cultures into the judicial dialogue. At times, this may cause controversy. But that only expresses a vitality which the state delegations gathering in Brighton should not attempt to suffocate by conventional over-regulation.

Foto: Ancien Palais des Droits de l’ Homme (Conseil de l’Europe)

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